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TRI-COUNTY ELECTRIC
COOPERATIVE, INC.,

Complainant,

vs.

ILLINOIS POWER COMPANY, d/b/a
AMEREN IP,

Respondent.

CHIEF CLERK'S OFFICE

Case No. 05-0767

MOTION BY TRI-COUNTY ELECTRIC COOPERATIVE, INC.
FOR SUMMARY JUDGMENT

TRI-COUNTY ELECTRIC COOPERATIVE, INC., (Tri-County) by it attorneys,
GROSBOLL, BECKER, TICE & TIPPEY, files herewith its Motion for Summary Judgment in
the above docket pursuant to the Illinois Civil Practice Act 735 ILCS 5/2-1005 and the Rules of
Practice of Illinois Commerce Commission 83 Ill Adm Code, Section 200.190, and in support
thereof states as follows:

A. STATUS OF THE CASE

1. Tri-County filed its original Complaint in this matter against Illinois Power Company
dba AmerenIP (IP), alleging the right to provide electric service to a gas plant constructed and
operated by Citation Oil & Gas Corporation (Citation Oil) on property described as follows, to
wit: Sections 5 and 6, Township 1 North, Range 2 East of the Third P.M., Marion County,
Illinois. The basis for Tri-County's Complaint stems from a Service Area Agreement between
Tri-County and IP dated March 18, 1968 and approved by the Illinois Commerce Commission
(Commission) by order entered July 3, 1968 defining territories in which each of Tri-County and

IP are delineated the exclusive right to provide electric service. The gas plant is located in territory in which Tri-County holds the exclusive right to provide electric service as identified on Exhibit 3 attached to the Marcia K. Scott Affidavit and Tri-County's Amended Complaint . On February 7, 2007, Tri-County filed its Amended Complaint adding Count II wherein Tri-County alleged that it had the right to provide electric service to seven out of eight new gas compressor sites operated by Citation to feed gas to the gas plant because the seven gas compressor sites are located in Tri-County's service territory pursuant to the aforesaid Service Area Agreement as shown by Exhibit 3 attached to the Marcia K. Scott Affidavit and Tri-County's Amended Complaint. IP filed its Answer denying Tri-County's claim that it had the right to provide electric service to the gas plant and seven of eight gas compressor sites claiming that IP was providing electric service to the new gas plant and new compressor sites by means of a customer owned distribution system connected to the IP Texas substation. The Citation owned distribution lines are also used by IP to provide electric service to Citation's Salem oil field with oil wells located throughout the service areas of both Tri-County and IP as designated by the aforesaid Service Area Agreement. The parties have conducted discovery and have filed cross motions for summary judgment on Tri-County's Amended Complaint and IP's Answer thereto.

B. GENERAL FACTUAL CLAIMS OF TRI-COUNTY

1. Tri-County is an Illinois general not-for-profit corporation engaged in the business of the sale and distribution of electrical energy in Jefferson, Marion and Washington Counties, Illinois. IP is an Illinois corporation engaged in the business of generation, distribution and sale of electrical energy in the State of Illinois. Both are electric suppliers within the meaning of the Act.(Tri-County Amended Complaint).

2. Pursuant to the provisions of Section 6 of the Act, Tri-County and IP entered into an Agreement dated March 18, 1968 (Agreement) and approved by the Illinois Commerce Commission (Commission) by an Order entered July 3, 1968 which defines and delineates between Tri-County and IP one or more service areas located in Sections 4, 5, 6, 7, 8 and 9 of Township 1 North and Sections 20,29, 30, 31 and 32 of Township 2 North, all in Range 2 East of the Third P.M., Marion County, Illinois, a copy of such Service Area Agreement being attached as Exhibit 1 to the Tri-County Amended Complaint and the Marcia K. Scott Affidavit.

3. A customer, namely Citation Oil & Gas Corp (Citation Oil), has constructed a gas plant located on the following described property, to wit:

Sections 5 and 6, Township 1 North, Range 2 East of the Third P.M., Marion County, Illinois;

all as more specifically shown on the plats attached to the Marcia K. Scott Affidavit and Tri-County's Amended Complaint as Exhibits 2 and 3. The gas plant, which has a total electric load of 566 KW, is located in Tri-County's service area designated under the Service Area Agreement and therefore is subject to Section 3(a) of the Service Area Agreement dated March 18, 1968 and the service territory established thereby (Affidavit of Robert C. Dew Jr.; Affidavit of Bradley Dale Grubb; Affidavit of Marcia K. Scott).

4. As a part of the Citation gas plant, Citation has installed eight new gas compressor sites of which seven are located in the service territory of Tri-County as established by the aforesaid Service Area Agreement. The location of each of the new gas compressor sites are identified as sites numbered One, Two, Three, Four, Five, Six, Seven, and Eight on Exhibit 3 attached to the Marcia K. Scott Affidavit and Tri-County's Amended Complaint. Gas

compressor sites numbered One, Two, Three, Four, Five, Seven and Eight are in Tri-County's service territory established by the aforesaid Service Area Agreement as shown by the aforesaid Exhibit 3. The electric service to the new gas plant and each of the new gas compressor sites requires installation of a transformer and service connection point in accordance with acceptable engineering practices in the industry. The required electric load for each gas compressor site is anticipated to be less than 1500 KW and electric service to each of the new gas compressor sites is subject to Section 3(a) of the Service Area Agreement dated March 18, 1968 and the service territory established thereby (Affidavit of Robert C. Dew, Jr.).

5. The electric service connection point for the gas plant consists of a pad mounted three phase transformer, cutoffs, fuses and associated equipment which reduces the 12,470 volts received from the distribution line to 277/480 volts for use by the motors and equipment operating the gas plant. The electric service connection point for each of the gas compressor sites consists of a bank of transformers, fuses, cutoffs, and associated equipment necessary to reduce the distribution line voltage to 277/480 volts to operate the equipment at the gas compressor sites. Each of the service connection points for the compressor sites and the gas plant constitute an electric service connection point within the meaning of the standard accepted engineering practices in the electric utility industry. None of the electric service delivery points for the gas plant and the gas compressor sites were in existence or energized on March 18, 1968 (Affidavit Robert C. Dew, Jr.).

6. Tri-County has a three-phase electric distribution line located immediately south of and adjacent to the premises and facilities of the gas plant (identified as a black line on Tri-County's Exhibit 3 map), which was originally constructed as a single phase line June 17, 1939

and which was upgraded to a three-phase line November 30, 1948. In addition, Tri-County erected on February 28, 1986, a three-phase line located immediately to the west of the gas plant premises to serve Energy West, Inc. The line was retired in December 1997. In addition, Tri-County serves the office complex of Citation located immediately northwest of and adjacent to the gas plant premises by a single-phase line. The aforementioned single-phase line was connected by Tri-County for electric service to Citation's office complex December 29, 1998 (Marcia K. Scott Affidavit; Tri-County's Exhibit 2 attached to Marcia K. Scott's Affidavit and Tri-County's Amended Complaint).

7. IP currently provides all of the electric service to each of the new gas compressor sites including compressor sites numbered 1 through 5 and compressor sites numbered 7 through 8 and the new gas plant by means of the IP Texas substation from which the electricity is then taken by the customer, Citation, through a private distribution line owned by Citation to each of the respective service connection points for each of the gas compressor sites and the gas plant. All of the service connection points, except the service connection point for gas compressor site 6, are situated within the Tri-County designated service territory under the aforesaid service area agreement (Affidavit of Robert C. Dew, Jr. and Tri-County plat marked Exhibit 3).

8. IP has, by its conduct, acknowledged that the Citation gas plant is located in territory designated by the Service Area Agreement to be served exclusively by Tri-County. IP has further, by its conduct, acknowledged that the Citation gas plant is located such that Tri-County has the right to provide all the electric service to the gas plant site (Affidavit of Marcia K. Scott).

9. IP has made numerous changes to its Texas substation which is used to deliver electric service to the Citation electric distribution system which carries IP's electricity to the delivery

point for the Citation gas plant and the seven Citation gas compressor sites, all located within Tri-County's designated service territory under the Agreement. The changes made since March 18, 1968 constitute extensive modifications to the Texas substation as determined by Robert C. Dew, Jr., P.E., the electrical engineer for Tri-County who investigated the substation as well as the delivery points for electric service to the gas plant and the eight compressor sites. The modifications were estimated by Robert C. Dew, Jr. to have cost IP between \$500,000.00 to \$1,000,000.00 over the years and were made to enable IP to serve existing load and new load from the Texas substation. It is the opinion of Robert C. Dew, Jr. that the following additions, changes or modifications to the Texas substation constituted modifications which increase the capacity of the Texas substation to serve additional and/or new loads as follows:

<u>Dates</u>	<u>Modification/Addition</u>
02/24/69	Foundation for and 6,000 KVR capacitor bank installed
1969	3,000 KVAR capacitor bank installed
04/1971	Installed 6,000 KVR (69KV 10,800/6,000 T-KVAR capacitor) to correct excessive voltage crop caused by additional load added to the substation
1972	Added 15 KV oil circuit breaker and vacuum circuit breaker
1973	Added a 15KV oil circuit breaker to protect transformer #2
1974	Added 1,200KV and 14.4KV Allis Chalmers oil circuit breaker
1976	Replaced transformer #2
10/03/78	Added a three phase Westinghouse transformer
1991	Added a 12KV vacuum circuit breaker GE type
1991	Added a 15KV circuit breaker

1992

Added a SCADA system and associated communication additions which allows IP to maximize the existing capacity carried by the substation thereby allowing IP to serve additional load from the substation.

10. The foregoing modifications, changes and additions to the IP Texas substation since March 18, 1968 have allowed IP to serve additional load through that substation which IP would otherwise not have been able to do without such modifications (Robert C. Dew, Jr. Affidavit Exhibit No. 2).

11. Citation expended an estimated \$76,335.00 to rebuild 1,161 feet of No. 4 CU three phase line to 2/0 ACSR three phase line and to build 4,119 feet of new 2/0 ACSR three phase distribution line to serve the gas plant by means of the IP Texas substation (Robert C. Dew, Jr. Affidavit and Dennis R. Ivers Affidavit).

12. Tri-County's Salem Substation and Tri-County's three phase line emanating therefrom and located adjacent to the Citation gas plant are adequate to serve the Citation gas plant. The estimated cost for Tri-County to extend its electric service from that three phase line to the gas plant is \$28,051.00 (Affidavit of Dennis R. Ivers).

C. TRI-COUNTY'S CLAIM

1. Tri-County claims that since the Citation gas plant and seven of the eight Citation gas compressor sites that feed gas to the gas plant for processing are located in the Tri-County designated service territory under the aforesaid Service Area Agreement and since the electrical load at each of the gas plant and the gas compressor sites is less than 1500KW, Section 3(a) of the Service Area Agreement governs the territorial dispute. Section 3(a) of the Agreement provides that:

“...each party shall have the exclusive right to serve all customers whose points of delivery are located within its service areas and neither party shall serve a new customer within the service areas of the other party.”

2. Because the electric delivery points for the gas plant and the gas compressor sites are not “existing points of delivery” as defined by Section 1(d) of the Agreement since each service connection point did not exist on March 18, 1968, the date of the Agreement, each constitute a service connection point for a “new customer” as defined by Section 1(c). Even though Citation or its predecessor was an “existing customer” as defined by Section 1(b) of the Agreement, Citation as the “existing customer” becomes a “new customer” within the meaning of Section 1(c) of the Agreement which provides that when an “existing customer” “...applies for ...electric service at a point of delivery which is ...not energized on the effective date of this (the) Agreement.”, the “existing customer” is treated the same as a new customer.

3. On February 18, 2005, Tri-County received a telephone request from Citation for electric service to the Citation gas plant by means of a three phase line from Tri-County’s facilities located 200 to 250 feet south of and adjacent to the gas plant (Affidavit of Marcia K. Scott; Affidavit of Dennis R. Ivers).

4. A “point of delivery”, as understood in the electric service industry, generally consists of the point where electric service at a higher distribution voltage such as 12,470 volts is delivered to a transformer or bank of transformers with cutouts and fuse protection, and necessary associated equipment. The transformer or transformers step the voltage down from 12,470 volts to a voltage appropriate for the voltage requirements of the motors and equipment being served through that point of delivery. In this case, at each of the eight compressor sites electric distribution lines deliver electricity at 12,470 volts to a transformer or bank of

transformers which in turn reduce the voltage to 277/480 volts for use by the motors at each compressor site. At the Citation gas plant, electricity is delivered by a distribution line at 12,470 volts to a pad mounted three phase transformer which reduces the voltage to 277/480 volts for use by the motors and equipment operating the Citation gas plant (Affidavit of Robert C. Dew, Jr., P.E.). Accordingly, each of the points where electricity is delivered to the gas compressor sites numbered 1 through 5 and numbers 7 through 8 and the Citation gas plant constitute a separate delivery point of electric service, as generally recognized within the electric utility industry, that did not exist on March 18, 1968 and July 3, 1968 when the Agreement between Tri-County and IP was entered into and approved by the Commission respectively (Affidavit of Robert C. Dew, Jr.).

5. IP recognized that the Citation gas plant and each of the gas compressor sites 1 through 5 and numbers 7 through 8 were located in Tri-County's designated service territory and as such, when Citation requested electric service from IP, advised Citation through its employees and agents that IP could not provide the electric service without the consent of Tri-County since those delivery points were located in Tri-County's service territory. The IP representative to wit, Michael Tatlock, went so far as to advise the Citation representative that if Citation moved its gas plant between one-quarter and one-half mile further north from its existing location, that it would be located in IP's designated territory and IP could provide that electric service. The gas plant was not moved by Citation (Marcia K. Scott Affidavit identifying IP communications provided in IP's Response to Tri-County Discovery, Group Exhibit 5 consisting of a series of e-mail communications attached to the Marcia K. Scott Affidavit).

6. Tri-County further claims that the providing of electric service by IP to the delivery

points for the gas plant and the gas compressor sites 1 through 5 and sites 7 through 8 violates the intent of the Agreement by allowing IP to serve delivery points for electric service to the customer Citation that were not in existence on March 18, 1968 and which are located in Tri-County's exclusive service territory. IP's acts and omissions further violate the purpose of the Service Area Agreement by creating duplicate facilities and investment for providing electric service within the territory designated to be served by Tri-County under the Agreement.

D. IP'S CLAIM

1. IP claims that it has not provided any electric service to the Citation gas plant or the eight compressor sites but rather does nothing more than continue to deliver electric service to Citation at the IP's Texas substation which has been in existence and utilized by IP for many years to serve Citation and its predecessors by means of a customer owned distribution line running from the IP Texas substation to numerous oil wells. IP further claims that it is the customer who has taken the IP electric service from the IP Texas substation through the customer owned distribution line to serve the "new delivery points" for each of the gas plant and the gas compressor sites. Therefore, IP claims that it has done nothing in violation of the Service Area Agreement.

2. IP further claims that Citation created the new delivery points and that IP electricity to the Citation gas plant and the eight Citation gas compressor sites is provided through the IP Texas substation which has been in existence since prior to the date of the Service Area Agreement between Tri-County and IP.

E. TRI-COUNTY'S RESPONSE TO IP'S CLAIMS

1. Tri-County, in response to IP's claims, notes that IP does not dispute that the electrical

service connections made from the customer owned (Citation) line at the gas plant and at each of the eight compressor sites constitute what is customarily recognized as an electric service delivery point within the electrical supplier industry since each location consists of a transformer or group of transformers plus additional electrical apparatus necessary to reduce electrical distribution voltage to a voltage that can be used by motors and other equipment located at the site. Tri-County also notes that IP does not dispute that the electric service connection points created at the Citation gas plant and the eight compressor sites did not exist on the date of the Agreement. Thus, each constitute a new delivery point to an “existing customer” and under Section 1(c) of the Agreement, the request by Citation for electric service to the gas plant and the eight compressor sites constitutes a request by a “new customer” per the Agreement. The “new customer” delivery points are all, except for gas compressor site number 6, located in the electric service territory designated to be served exclusively by Tri-County.

2. Tri-County further claims that even if the electric service delivery point for the gas plant and the eight compressor sites is still the IP Texas substation, IP has modified that substation on numerous occasions subsequent to the date of the Agreement to expand its ability to provide for additional electric service in the area. Thus, those modifications to the IP Texas substation create a new service connection point of the Texas substation subsequent to the Agreement date and within the meaning of Section 1(d) of the Agreement.

ARGUMENT

A. UNDISPUTED MATERIAL FACTS

Many of the facts in this case are undisputed giving rise to the basis for Tri-County’s Motion for Summary Judgment. The undisputed facts are:

1. Both Tri-County and IP are electric suppliers under the Act and are subject to the jurisdiction of the Illinois Commerce Commission with respect to territorial disputes. Tri-County and IP entered into a Service Area Agreement on March 18, 1968 which was approved by Order of the Commission entered July 3, 1968.

2. Citation has constructed and is now operating a gas plant and eight compressors sites of which the gas plant and compressor sites 1 through 5 and 7 through 8 are all located in the service territory designated by the aforesaid Agreement to be served exclusively by Tri-County.

3. The gas plant is served by electricity delivered through a customer owned (Citation) 12,470 volt electric distribution line to a point adjacent to the gas plant where the distribution electric voltage is stepped down by means of a pad mounted three phase transformer to the voltage of 277/480 volts so that the electricity can be used to operate motors and equipment within the gas plant. Each of the gas compressor sites are served by a 12,470 volt electric distribution line and at each gas compressor site the electric distribution voltage is reduced by a transformer or bank of transformers and associated equipment to 277/480 volts so that the electricity may be used to operate motors and equipment at the compressor sites. Each of the aforesaid transformer sites contain all of the necessary apparatus and equipment required for a customary electric service connection point and comprise what is customarily understood in the electric utility industry as points of delivery of electric service which were not in existence on March 18, 1968 and are therefore new "points of delivery" of electricity (Affidavit of Robert C. Dew, Jr.).

4. Tri-County has a three phase electric distribution line located 200 to 250 feet immediately south of and adjacent to the gas plant premises which line has been in existence

since July 17, 1939 as a single phase line and which was upgraded to a three phase line on November 30, 1948. Tri-County had a three phase line located immediately west of the gas plant premises installed February 28, 1986 to serve Energy West, Inc. and subsequently retired in December 1997. Tri-County provides electric service to the office complex of Citation located immediately north of and adjacent to the gas plant premises by means of a single phase line which electric service was connected by Tri-County to the Citation office complex on December 29, 1998 (Affidavit of Marcia K. Scott).

5. On February 18, 2005, Citation through its engineers, employees and agents made a request for electric service from Tri-County for the Citation gas plant (Marcia K. Scott Affidavit).

6. Subsequently, Citation contacted IP about providing electric service to the gas plant and was told by IP employees, agents, and Michael Tatlock, engineer for IP, that the gas plant was located in Tri-County service territory and that IP could not provide the electric service unless Tri-County consented (Marcia K. Scott Affidavit).

7. Michael Tatlock, on or about March 8, 2005 and again on April 25, 2005, explained to Citation employees that Citation must move the gas plant between one-quarter mile and one-half mile north from its existing location in order for IP to provide electric service. On April 26, 2005, Conrad Siudyla, an IP employee, communicated with employees of IP that Tri-County has the right to serve the Citation gas plant electric load and that if Citation extends its distribution line to the gas plant load, it would violate the Agreement between Tri-County and IP (Marcia K. Scott Affidavit).

8. On June 21, 2005, IP employees advised Citation employees that IP cannot provide

electric service to the Citation gas plant without consent by Tri-County and acknowledged that Tri-County will consider Citation's request to IP for electric service to the gas plant as a request for a new point of delivery of electric service (Marcia K. Scott Affidavit).

9. On June 22, 2005, Tri-County employees and representatives met with Citation employees and representatives and Citation advised Tri-County that Citation wanted to build its own service distribution line to the Citation gas plant. Tri-County did not consent to the Citation request (Marcia Scott Affidavit Exhibit).

10. On July 14, 2005, IP representatives advised Tri-County that they had changed their mind and intended to provide electric service to the Citation gas plant on the basis of IP's service to the Citation oil field through its Texas substation (Marcia K. Scott Affidavit).

11. Citation expended an estimated \$76,335.00 to rebuild its existing 12,470 volt three phase distribution line and construct a new 12,470 volt three phase line to deliver IP electricity from IP's Texas substation to the Citation gas plant (Affidavits of Robert C. Dew, Jr., and Dennis R. Ivers).

12. The Tri-County three phase line adjacent to the Citation gas plant and Tri-County's Salem substation are adequate to serve the Citation gas plant. The estimated cost to Tri-County to extend its electric service to the gas plant is \$28,051.00 (Affidavit of Dennis R. Ivers).

B. THE SERVICE AREA AGREEMENT DATED MARCH 18, 1968 PROVIDES THE FOLLOWING:

The relevant provisions of the March 18, 1968 Service Area Agreement are:

Section 1(b): "Existing customer" as used herein means a customer who is receiving electric service on the effective date hereof."

Section 1(c): "New customer" as used herein means any person, corporation, or entity,

including an existing customer, who applies for a different electric service classification or electric service at a point of delivery which is idle or not energized on the effective date of this Agreement.

Section 1(d): "Existing point of delivery" as used herein means an electric service connection which is in existence and energized on the effective date hereof. Any modification of such electric service connection after the effective date hereof by which an additional phase or phases of electric current are added to the connection, shall be deemed to create a new point of delivery.

Section 3 (a): Except as otherwise provided in or permitted by this Section and Sections 4 and 7 of this Agreement each party shall have the exclusive right to serve all customers whose points of delivery are located within its Service Areas and neither party shall serve a new customer within the Service Areas of the other party.

Section 3(b): Each party shall have the right to continue to serve all of the existing customers and all of its existing points of delivery which are located within a Service Area of the other party on the effective date.

The facts are clear that Citation established "new electric service delivery points" for the gas plant and the eight compressor sites that are used to feed gas to the gas plant. Those delivery points consist of transformers capable of stepping down the distribution line voltage from 12,470 volts to 277/480 volts for use at each of the eight compressor sites and to 277/480 volts for use at the gas plant. Without the step down transformer and the associated electrical apparatus needed for the same, the distribution line voltage would be unusable at each of the eight compressor sites and the gas plant. It is also clear from the opinion of Robert C. Dew, Jr., engineer for Tri-County, that the apparatus installed for stepping down the voltage from the distribution line to a reasonable voltage for the compressor sites and the gas plant represents a typical service delivery point as accepted for engineering purposes in the electric utility industry. The Commission has determined that a "normal service connection point" for delivery of electric service is deemed to be where the transformers are located for an industrial consumer Interstate Power Company v.

Jo-Carroll Electric Cooperative, Inc. Ill Com Comn 92-0450 and 93-0030 Consolidated on Remand, page 10 of the Order (October 9, 1996) (Copy of the Commission Order in Docket Nos 92-0450 and 93-0030 is attached for convenience).

Under the applicable provisions of the Service Area Agreement between Tri-County and IP, the following points are clear:

(a) an "existing customer" is one which is receiving electric service from either Tri-County or IP on the date of the Agreement, to wit: March 18, 1968;

(b) a "new customer" is any person, corporation or entity who applies for electric service at a "point of delivery" which was not energized on the effective date of the Agreement, to wit: March 18, 1968;

(c) an "existing point of delivery" is an electric service connection which is in existence and energized on the date of the Agreement, to wit: March 18, 1968;

(d) an "existing customer", that is a customer who was receiving electric service from either Tri-County or IP on the date of the Agreement, March 18, 1968, becomes a "new customer" if the customer applies for electric service at a "point of delivery" which was not energized or in existence on March 18, 1968.

(e) when the demand for electric service at the new service connection point does not exceed 1500 KW, the right to serve the new service connection point is controlled by the territory boundary lines established by the Service Area Agreement and Section 3(a) of the Agreement.

There is no dispute that each of the service connection points as identified by Tri-County's engineer at each of the eight compressor sites and the gas plant were not in existence on March 18, 1968. They have been created by Citation, the customer, subsequent to that date and

for the purpose of reducing distribution line voltage to a voltage usable by the appropriate electric motors and equipment operated by Citation at each of the compressor sites and the gas plant. Without the transformers and other electrical apparatus needed to step down the distribution line voltage, Citation would not be able to operate the equipment at the compressor sites or the gas plant. Accordingly, a plain reading of the Agreement leads one to the conclusion that Citation has in fact created a new electric service connection, as customarily defined in the electric utility industry, for each of the eight compressor sites and the gas plant. Consequently, Citation, as an “existing customer” of IP, becomes a “new customer” by reason of establishing the new electric service connection points and requesting electric service at the location of each new electric service connection point.

It is further clear that none of the electric service utilized by Citation at the gas plant or the eight compressor sites is generated by Citation. The electricity is that generated by IP. Thus, IP becomes the provider of the electricity used by Citation to serve the gas plant and eight compressor sites through the new service connections points for each. Section 3(a) of the Agreement makes it clear that “...neither party shall serve a new customer within the service area of the other party.” It is further clear from the Service Area Agreement and the map marked Exhibit 3 attached to Tri-County’s Amended Complaint and this Motion for Summary Judgment that compressor sites 1 through 5 and 7 through 8 as well as the gas plant are all located within the service territory designated under the Agreement to be the exclusive service territory of Tri-County. Accordingly, IP is providing electric service to the new electric service connection points at both the compressor sites and the gas plant which IP is not otherwise authorized to do pursuant to Section 3(a) of the Agreement. Thus, IP’s actions are in derogation of the plain

meaning of the Agreement.

C. THE COURSE OF CONDUCT OF TRI-COUNTY AND IP IN APPLYING THE SERVICE AREA AGREEMENT TO CITATION'S SERVICE REQUEST EXEMPLIFIES THE INTENT OF THE PARTIES AS EXPRESSED BY THE AGREEMENT

Tri-County believes the Service Area Agreement clearly establishes Tri-County's right to serve in this case. However, even if there is a question as to the intent of the parties under the Agreement, the course of conduct of the parties verifies the conclusion reached by Tri-County as to its right to serve the electric service connection points at issue in this case. Citation first requested electric service for the gas plant from Tri-County. Later requests were made by Citation to IP for electric service to the gas plant, but IP's representatives, including their engineer and regulatory specialist advised Citation that the gas plant was located in Tri-County service territory and IP could not serve the gas plant without Tri-County's consent. When Citation stated its intent to take the IP electric service at the IP Texas substation and simply distribute the electricity through the Citation owned distribution line to the gas plant and the eight compressor sites ignoring Tri-County's service rights, IP's representative advised Citation that IP could not allow that to happen without the consent of Tri-County. Tri-County did not acquiesce to such service. Regardless of that fact, Citation apparently persuaded IP to sit idly by while Citation takes IP's electricity through Citation's distribution system to the gas plant thereby defeating Tri-County's service rights.

It is clear from conversations that ensued between the period of time from Citation's first request for electric service from Tri-County through July of 2005 that IP's interpretation of the relevant provisions of the Service Area Agreement coincided with Tri-County's interpretation of

those identical provisions and in accordance with the plain meaning of the Agreement. Only when Citation, the customer, persuaded IP to stand idly by did IP's interpretation of the Agreement change allowing the arrangement to be concluded so that IP could provide the electricity to the gas plant and eight compressor sites in violation of IP's duties and responsibilities under the Service Area Agreement.

The Commission in interpreting service area agreements has long followed the axiom that the Service Area Agreement will control the dispute Rural Electric Convenience Cooperative Co. vs Illinois Commerce Commission 75 Ill 2d 142; 387 NE2d 670; 25 Ill Dec 794, 796 (1979). It is also clear that the intent of the parties as expressed by the Agreement should be preserved. In construing the intent of the parties as evidenced by the Agreement, there is no better evidence of the intention of the parties than the interpretation they themselves place on the Agreement Berry v. Blackard Construction Co 13 Ill App 3d 768; 300 NE2d 627, 630 (4th Dist 1973). Those actions by the parties contemporaneously with or subsequent to the Agreement evidencing the practical construction placed upon the Agreement by the parties may be considered to determine the intent of the parties regarding the Agreement Occidental Chemical Co. v Agri Profit Systems, Inc. 37 Ill App 3d 599; 346 NE2d 482, 484 (2nd Dist 1975). See also Mendelson v Flaxman 32 Ill App 3d 644; 336 NE 316, 319-320 (1st Dist 4th Div 1975) where the court held that the interpretation placed on a contract by the parties as represented by their actions evidences the intention of the parties under the Agreement.

The intent of the parties as expressed in the Agreement is exemplified by the course of conduct of both Tri-County and IP, both as to the Citation request for service in 1998 for Citation's office complex and the initial request for electric service by Citation at the gas plant.

Citation requested and Tri-County provided electric service to Citation's office complex in December 1998. The electric service connection point for the office consisted of a transformer and associated apparatus customary for electric service connection points and it was "new" in that it did not exist on March 18, 1968. Further, it was located in Tri-County's service territory. IP agreed with the interpretation of the Service Area Agreement by Tri-County that Tri-County was authorized to serve Citation's new electric service connection point for the office complex even though IP was providing electricity to Citation at the IP Texas substation.. Similarly, IP's representatives applied the same interpretation to the Agreement in the present case and determined that the gas plant was located in Tri-County service area and taking into account the size of the load told Citation that they must take their service for the gas plant from Tri-County. That interpretation remained intact for at least six months or longer until finally Citation persuaded IP for some unknown reason to simply turn its collective corporate head in the other direction while Citation moved IP electricity from the Texas substation through the Citation customer owned distribution line to the newly established electric service connection points for the gas plant and seven of the eight gas compressor sites located in Tri-County service territory. This action is in violation of the Service Area Agreement and should not be allowed by the Commission. IP cannot now change the course of conduct it has followed over the years in interpreting the relevant provisions of the Service Area Agreement as they apply to the electric service provided to Citation at the Salem Oil Field.

D. THE CUSTOMER DOES NOT HAVE THE RIGHT TO CHOOSE ITS ELECTRIC PROVIDER.

The parties entered into a service area agreement pursuant to Section 30/6 of the Electric

Supplier Act, 220 ILCS 30/6 designating their respective exclusive service territories in order to prevent duplication of facilities. The Agreement was in furtherance of the Legislative Declaration upon which the Electric Supplier Act was prefaced and as expressed in 220 ILCS 30/2 as follows:

“The General Assembly declares it to be in the public interest that, in order to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electric service to the public, any 2 or more electric suppliers may contract, subject to the approval of the Illinois Commerce commission, as to the respective areas in which each supplier is to provide service.”

Only Tri-County has facilities adjacent to the Citation gas plant and the gas compressor sites.

The map marked Exhibit 2 attached to Tri-County's Amended Complaint and Motion for Summary Judgment shows that Tri-County has a three phase distribution line located immediately south of and adjacent to the Citation gas plant which was constructed in 1939 as a single phase line and upgraded in 1949 to a three phase line. Tri-County constructed an additional three phase line in 1986 immediately west of and adjacent to the Citation gas plant to provide service to West Energy, Inc. The line was later retired in 1997. Citation requested Tri-County to provide electric service by way of a single phase line to the Citation office complex which lies immediately north and west of and adjacent to the gas plant. Tri-County continues to provide this electric service to Citation. Thus, Tri-County has facilities within just a few hundred feet of the gas plant which are adequate for and could be used to supply the electric service to the gas plant. No electric service lines of IP exist near the gas plant or the eight compressor sites. Rather, the Citation owned distribution line, some of which had to be upgraded and a large portion had to be built new at considerable expense, is utilized by IP to provide IP electric service to the gas plant and gas compressor sites.

Thus, the providing of electric service by IP whether through its own facilities or those of its customer's facilities constitute a duplication of facilities for providing electric service to the gas plant in violation of the expressed Legislative declaration regarding service area agreements and the intended purpose of the Tri-County/IP Service Area Agreement designating specific service territories in general.

Further, the Commission has long held that the customer does not have a right to choose its electric provider except in limited circumstances, none of which apply in this case. See "Central Illinois Public Service Company v. Illinois Commerce Commission and Southwestern Electric Cooperative, Inc. 202 Ill App 3d 567; 560 NE2d 363; 148 Ill Dec 61, 66 (4th Dist 1990) where the court held that consumers have been legislatively foreclosed from seeking electric service from a supplier beyond their service territory. To the same effect is Central Illinois Public Service Company v. Illinois Commerce Commission and Wayne-White Counties Electric Cooperative, Inc. 223 Ill App 3d 718; 585 NE2d 1302; 166 Ill Dec 280, 282 (5th Dist 1992)(Wayne-White). Thus, the attempt by Citation to use its own customer electric distribution line to take electric service from IP's Texas substation, which is not even located in IP's service territory but rather in Tri-County's service territory, and distribute it over one mile on an electric distribution line to the new service connection point of the gas plant and each of the gas compressor sites, all of which but one are located in Tri-County's designated service territory, defeats the very purpose of the Service Area Agreement and the rules established by the Commission and the courts of this State prohibiting customers in this setting from choosing their own electric supplier in defiance of the Commission's jurisdiction to regulate service territories.

In Illinois Power Company v Illinois Valley Electric Cooperative Ill Com Comn 88-0276

(June 21, 1989), the customer, Unimin, was served by Illinois Power under a Service Area Agreement, in which Sections 1 and 3 are very similar to Sections 1 and 3 of the service area agreement in this case. Unimin operated a silica sand mine consisting of a processing plant and adjoining strip mines. IP served the processing plant. Unimin took electric service provided to it by IP at its processing plant and distributed it by means of the Unimin owned distribution system to various strip mines located in IP's designated service territory. When Unimin opened a new strip mine located in Illinois Valley's service territory, IP requested authority from the Commission to move electricity supplied by IP at the processing plant to the new mining location by means of the Unimin owned distribution facilities. At the new strip mine operation, a new service delivery point was required, including transformers and other associated apparatus. The new delivery point as well as the new strip mining operation were both located in Illinois Valley's designated service territory under the Service Area Agreement. The Commission determined the new strip mine and delivery service point were both located in Illinois Valley's designated service territory and therefore, only Illinois Valley was authorized to serve the new delivery point. While the Commission decision dealt with temporary service authority, the Commission Order effectively terminated the dispute and Illinois Valley become the service provider at the new Unimin strip mine location. The commission Order effectively denied Illinois Power the authority to serve the new electric service connection point for the new strip mining operation by means of the customer owned distribution system and found that Illinois Valley Electric Cooperative was the appropriate electric supplier for the new electric service delivery point (Copy of the Commission Order in Docket No. 88-0276 is attached for convenience).

IP seeks the same authorization in the instant case to serve the new Citation delivery point for the new gas plant and gas compressor sites located in Tri-County's designated service territory by use of the customer, Citation, owned distribution line. Nothing in the Agreement allows IP to do this and specifically commands IP not to serve a new delivery point located in Tri-County's service territory. The Commission should be consistent and again prohibit IP's claim of right.

E. ILLINOIS POWER SHOULD NOT BE ALLOWED TO DO INDIRECTLY WHAT IT CANNOT DO DIRECTLY

It is clear that Illinois Power cannot utilize one of its own electric distribution lines to take electric service from the Texas substation to the Citation gas plant or to the seven gas compressor sites located in Tri-County's service territory. Likewise, IP should not be allowed to do so through the Citation owned distribution system because to allow such subverts the Service Area Agreement, the intent of both Tri-County and IP with respect to the same as exemplified by the course of conduct of Tri-County and IP in interpreting the Service Area Agreement, and defies the regulatory power of the Commission as established by the Legislature. If such action is allowed by the Commission, it will license customers through the use of customer owned distribution facilities, to ignore valid binding obligations established between electric suppliers under service area agreements approved by the Commission, and create duplication of facilities for providing electric service rendering it impossible for electric suppliers to have the ability to provide efficient electric service to their customers. Such action by IP and the customer does not conform with the intent of the Legislature in adopting the Electric Supplier Act and should not be allowed. Further, to allow such action in derogation of the valid Service Area Agreement

between Tri-County and IP grants permission to any customer who is financially able to provide its own electric distribution system to violate public policy as established by the Legislature and the Commission under the Electric Supplier Act.

F. IP HAS MODIFIED ITS TEXAS SUBSTATION SUCH THAT IT CONSTITUTES A NEW POINT OF DELIVERY.

IP maintains that it has not established a new service connection point for the gas plant and the eight compressor sites and has simply continued to provide its electric power to Citation at the Texas substation. However, as noted by the Affidavit and Engineering Report of Robert C. Dew, Jr., there have been numerous changes, additions and modifications to the IP Texas substation since 1968, the date of the Service Area Agreement in this case, which have enabled IP to serve additional electric loads for customers through the Texas substation. IP has other customers than Citation that are served by the Texas substation. Each time that IP modifies its Texas substation so that it can serve additional load, whether for an existing customer or a new customer, it creates a "new point of delivery" or a "new service connection point" at the Texas substation within the meaning of Section 1(d) of the Service Area Agreement. Thus, any new customer or additional customer who has requested additional electric power from IP brought through the Texas substation is being served by a "new service connection point". If the "new point of delivery" is located in Tri-County's service territory, Tri-County is authorized to serve the same. The failure to interpret the Agreement in that manner would allow IP, by reason of its existing Texas substation, to continually add additional load of existing customers and new load of new customers to the Texas substation and serve customers located in territory designated by the Service Area Agreement to be served by Tri-County.

Tri-County believes that the attempt by IP to designate the Texas substation as the service connection point for the Citation gas plant and the eight compressor sites is erroneous for the foregoing reason. To do so allows IP to circumvent its own Agreement with Tri-County and to simply follow distribution lines to customers situated in Tri-County's designated service territory and to serve such customers with impunity out of the reach of the regulatory authority of the Commission. Such action frustrates the intent of the parties as expressed by the Agreement and violates the very heart of the Agreement as expressed in Section 3(a) that "...neither party shall serve a new customer within the service areas of the other party."

G. CONTRACTS MUST BE CONSTRUED SO AS TO AVOID ABSURD OR UNFAIR RESULTS

To construe the Service Area Agreement as IP proposes so that IP can utilize a customer owned distribution system to serve new electric service delivery points located in Tri-County's designated exclusive service territory is a grossly unfair interpretation of the Agreement. Every contract contains the implied covenant of good faith and fair dealing between the parties to the Agreement. Where a contract or portion thereof is susceptible to two conflicting constructions, one of which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted. Carrico v. Delp 141 Ill App 3d 684; 490 NE2d 972; 95 Ill Dec 880, 884; DeWitt County Public Bldg. Com'n v. DeWitt County 128 Ill App 3d 11; 469 NE2d 689; 83 Ill Dec 82, 83 (4th Dist 1984); Martindell v. Lake Shore National Bank 15 Ill 2d 272, 286 (1958).

It would be an absurd construction of the agreement and would imply bad faith on the part of IP to interpret the agreement to mean Tri-County received territorial rights only to agree to release those rights when electricity generated by IP is delivered not by IP but by the customer

owned distribution system to new service connection points located in Tri-County's service territory. IP's interpretation of the agreement reflects bad faith and unfair dealing on the part of IP and should not be adopted.

CONCLUSION

For the foregoing reasons, Tri-County believes there is no material issue of fact as to the essential factual issues which are:

1. Citation constructed a "new service connection point" for the gas plant and each of the eight gas compressors, seven of which along with the gas plant are located in Tri-County's designated service territory.

2. The service connection points as constructed by Citation for the gas plant and the gas compressor sites constitute electric service connection points in accordance with accepted engineering practices within the electric utility industry.

3. None of the service connection points for the gas plant and the gas compressor sites existed on March 18, 1968, the date of the service area agreement.

4. IP is providing the electric service used the gas plant and each of the eight gas compressor sites, seven of which along with the gas plant are located in Tri-County's designated service territory.

5. Even though Citation was an existing customer of IP, whenever an existing customer creates a "new service connection point" it becomes a new point of delivery to be served by the electric supplier in whose designated service territory the new point of delivery exists.

Accordingly, the proper interpretation of the Service Area Agreement as applied to these facts requires the determination that Tri-County is the appropriate electric supplier to the Citation

gas plant and to the gas compressor sites numbers 1 through 5 and 7 through 8.

WHEREFORE, Tri-County requests the following relief from the Illinois Commerce Commission:

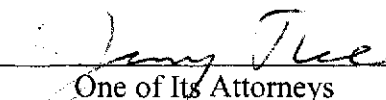
A. To grant summary judgment in favor of Tri-County awarding Tri-County the exclusive right to provide all electric service to the Citation gas plant and the seven Citation gas compressor sites located in Tri-County's service territory as designated by the Service Area Agreement.

B. To order Illinois Power to transfer electric service for the gas plant and seven gas compressor sites in Tri-County's service territory to Tri-County in a manner that will provide the least amount of service interruption to the customer and to require the customer to cooperate in such electric service transfer.

C. To order such other relief as may be just and equitable.

Respectfully submitted,
TRI-COUNTY ELECTRIC COOPERATIVE, INC.
Complainant,

By GROSBOLL BECKER TICE & TIPPEY

By: 
One of Its Attorneys

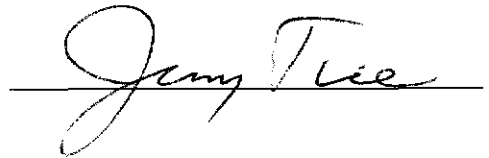
GROSBOLL, BECKER, TICE & TIPPEY
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Telephone: 217/632-2282

PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the ⁷~~31~~^{April}st day of ~~March~~, 2008, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the attached Motion by Tri-County Electric Cooperative, Inc. For Summary Judgment. addressed to the following persons at the addresses set opposite their names:

Elliott M. Hedin
Brown, Hay & Stephens, LLP
205 South Fifth Street, Ste. 700
P.O. Box 2459
Springfield, IL 62705-2459

Larry Jones
Administrative Law Judge
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701

A handwritten signature in cursive script, reading "Jerry Tice", is written over a horizontal line.